# In the Supreme Court of the United States

OCTOBER TERM, 1951

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LORETTA STARVUS STACK, AL RICHMOND, PHILIP MARSHALL CONNELLY, DOROTHY ROSENBLUM HEALEY, ERNEST OTTO FOX, WILLIAM SCHNEIDERMAN, CARL RUDE LAMBERT, HENRY STEINBERG, OLETA O'CONNOR YATES, ROSE CHERNIN KUSNITZ, MARY BERNADETTE DOYLE AND ALBERT JASON LIMA, *Petitioners*,

v.

JAMES J. BOYLE, United States Marshal,
*Respondent.*

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**On Petition for Bail Pending Application for a Writ of Certiorari and on Petition for a Writ of Certiorari**

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## MEMORANDUM FOR RESPONDENT IN REPLY TO PETITIONERS' MOTION OF OCTOBER 24, 1951.

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## MEMORANDUM FOR RESPONDENT IN REPLY TO PETITIONERS' MOTION OF OCTOBER 24, 1951.

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On October 24, 1951, the respondent was served by the petitioners in the above-entitled cause with a "Motion to dispense with printing of transcript of records on appeal, petition for writ of certiorari

and briefs, and, in the event certiorari is granted, submitting the cause on briefs and arguments of counsel before the court." Specifically, the motion requests, *inter alia,* that in the event certiorari is granted the cause be submitted on the briefs and arguments of counsel already presented to the Court. On October 24, there was filed with the Court the certified typewritten record from the Court of Appeals for the Ninth Circuit, and on October 25, a petition for a writ of certiorari was docketed. The petition for a writ of certiorari challenges as excessive under the Eighth Amendment the bail fixed for each of the petitioners by District Judge Mathes subsequent to their indictment for violation of the Smith Act.

1. As we have already indicated to the Court, we do not oppose dispensing with printing in this cause. Also, in the event certiorari is granted, we are willing to rest the cause upon the briefs and oral argument already presented to the Court, and upon this memorandum.

2. Examination of the record filed with the Court reveals a serious question not heretofore briefed by the parties or argued before the Court on October 18. The portion of the record involved is the transcripts of the proceeding before District Judge Mathes on August 15, 1951, on the return to writs of habeas corpus issued on behalf of 10 of the petitioners (all but Connelly and Schneiderman) and of the proceeding on August 29, 1951, in

which he entertained motions to reduce bail for the petitioners other than Connelly and Schneiderman and to fix or reduce bail for Connelly and Schneiderman.[1] This question is whether the petitioners could be said to have sustained their burden of proof on their contention that bail had been fixed in excessive amounts, when all of them, except the petitioner, Rose Chernin Kusnitz, refused, claiming the privilege against self-incrimination, to answer questions which were clearly pertinent in the discharge of the district court's duty to determine the amount of bail under Rule 46(c) of the Federal Rules of Criminal Procedure. A related question is whether such refusal precludes each of the petitioners, except Rose Chernin Kusnitz, from challenging the amounts of bail fixed by Judge Mathes as excessive.

Rule 46(c) of the Federal Rules of Criminal Procedure provides that:

> AMOUNT. If the defendant is admitted to bail, the amount thereof shall be such as in the judgment of the commissioner or court or judge or justice will insure the presence of the defendant, having regard to the nature and circumstances of the offense charged, the weight of the evidence against him, the financial ability of the defendant to give bail and the character of the defendant.

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[1] In the bail proceedings on August 29, it was stipulated and ordered that the record therein should include the record of the habeas corpus proceedings of August 15.

Under Rule 46(c), it is the duty of a Federal judge to inquire into the enumerated circumstances in determining what amount of bail "will insure the presence of the defendant."

During the proceedings[2] before Judge Mathes, each of the petitioners (except Kusnitz) refused to answer, upon grounds of self-incrimination, various questions, as follows:

Petitioner *Healey* refused to state the name of her employer, who pays her salary (1 R. 24-25), and how long she had been in her present job (1 R. 59).

Petitioner *Lambert* refused to state the name of his employer or his wife's employer (1 R. 28), whether he was paid by check or in cash (1 R. 29), and how long he had been in his present job (1 R. 60).

Petitioner *Doyle* refused to state the name of her employer, whether she was paid by check or cash (1 R. 30), and how long she had been in her present job (1 R. 60).

Petitioner *Stack* refused to state what her employment had been prior to March 1951, when she commenced to work for a San Francisco bakery (1 R. 33-34).

Petitioner *Richmond,* in response to questions, stated that he was employed by the Pacific Publishing Foundation as executive editor of the Daily

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[2] We shall refer to the typewritten record of the proceedings on August 15 as 1 R., and to the typewritten record of the proceedings on August 29 as 2 R.

People's World and the method by which he was paid (1 R. 35), his wife's employment, and the value of their real estate (1 R. 36). He also stated that he did not know who was the president of the Pacific Publishing Foundation (1 R. 42), that "the exact ownership I am really not aware of, as to who holds what stock and so on" (1 R. 41) that, "In terms of my operation there is no immediate superior" and that he was not the owner of the Pacific Publishing Foundation (1 R. 43). Thereupon, he refused to state what person had originally employed him as executive editor of the Daily People's World (1 R. 43).

Petitioners *Lima* (1 R. 47, 48, 61), *Steinberg* (1 R. 48, 49, 61), and *Yates* (1 R. 52, 53, 62) refused to state the names of their employers, whether they were paid by check or in cash, and how long they had been in their present jobs.

Petitioner *Fox* refused to state the name of his employer, whether he was paid by check or in cash (1 R. 50), the name of his wife's employer and whether she was paid by check or in cash (1 R. 51), and how long he had been in his present job (1 R. 61-62).

Petitioner *Schneiderman* refused to state his present occupation, where employed, who pays him, and how long he had been in his present job (2 R. 24-27). In fact, the only answer which he would give to any question was to state that he was paid by the week (2 R. 26).

Petitioner *Connelly* stated that he was employed as Los Angeles bureau editor of the People's Daily World, that he had been so employed for about two years, and that he was paid on a weekly basis (2 R. 27-30). However, he refused to answer the question, "Who or what organization is the owner of the Daily People's World that employs you" (2 R. 28-29), and whether he was paid by check or in cash (2 R. 30).

We do not dispute the right of each of the 11 petitioners listed above to assert the privilege against self-incrimination in response to these questions. However, we suggest that by refusing to answer the questions that the 11 petitioners have failed to maintain their burden of showing that the bail fixed for each of them by Judge Mathes is excessive and that by blocking in substantial respects the inquiry which it was the judge's duty to make under Rule 46(c), they may not now assert that his action was erroneous, i.e., that the bail is excessive.

As noted above, Rule 46(c) directs Federal judges in fixing bail to take into consideration, *inter alia*, "the financial ability of the defendant to give bail and the character of the defendant." While each of the petitioners has stated his weekly income, petitioners Healey, Lambert, Doyle, Lima, Steinberg, Fox, Yates, and Schneiderman refused to disclose the names of their employers. Clearly, the employer would be an obvious and reliable source of verification of those petitioners' statements as to their incomes, and the question was

thus relevant to the inquiry under Rule 46(c). A similar purpose justified the questions to petitioners Lambert and Fox as to the names of their wives' employers, the question to Stack as to her employment prior to March 1951, the question to Richmond as to what person had employed him as executive editor of the Daily People's World, the question to Schneiderman as to his occupation, and the question to Connelly as to the ownership of the Daily People's World which employed him. The refusal of seven petitioners to state whether they were paid by check or in cash would preclude both the court and the prosecution from obtaining through bank records the names of employers and the amounts of income or funds available to petitioners. Even as a general proposition, it would seem to be clear that a Federal judge proceeding under Rule 46(c) would not be bound to accept without inquiry defendants' general statements as to their financial ability. In the instant case of defendants indicted for violation of the Smith Act, it was clearly Judge Mathes' duty, under the Rule, to make such inquiries in view of the recent record of bail jumping by other individuals convicted or indicted for violation of the Smith Act.

Similarly, the petitioners' employers would be an obvious source of information as to character —particularly in terms of truthfulness and punctual discharge of obligations. Again, answers to the question addressed to eight of the petitioners as to how long they had been employed in their pres-

ent jobs would be indicative of the strength of their ties to the jurisdiction. Recent bail jumping in relation to Smith Act prosecutions would seem to make such inquiries as to character and ties to the jurisdiction unusually appropriate under Rule 46(c).

We assume that the 11 petitioners were entitled to refuse to answer these questions upon the ground of possible self-incrimination, and that their assertion of the privilege against self-incrimination cannot be held against them in the sense of affirmatively justifying bail in a particular amount. See *Zydok* v. *Butterfield*, 187 F. 2d 802, 804, certiorari granted October 8, 1951. However, the petitioners may not, by claiming that privilege, cast off their burden of showing that their bail was fixed in excessive amounts. Even on a direct appeal, there would be a presumption that the district judge correctly exercised his discretion in fixing bail. Certainly no less a presumption exists when his action is challenged by habeas corpus proceedings. The burden is upon the petitioners to show that in the light of their financial ability and the other factors enumerated in Rule 46(c) the district judge fixed bail in an excessive amount, rather than in an amount necessary to insure their appearance. They cannot sustain this burden by foreclosing relevant avenues of inquiry and insisting that the courts accept upon faith whatever statements the petitioners choose to make. The Fifth Amendment does not endow silence with

such persuasiveness. For analogous situations, see *Norwegian Nitrogen Products Co.* v. *United States,* 288 U.S. 294, 323-324; *The Consul Corfitzon* [1917] A.C. 550, 555-556; *The Kronprinzessin Victoria* [1919] 261, 267-268; *In re Von Kantzow's Patent* [1944] Ch. Div. 318, 321.

Judge Mathes attempted to perform his duty under Rule 46(c) by addressing relevant questions to the petitioners. As indicated above, all of the petitioners, except Kusnitz, blocked his inquiry by refusing to answer such questions. By so doing, the 11 petitioners precluded themselves from challenging as excessive bail fixed in any amount within reason. Thwarted as he was in seeking to amplify and verify the circumstances as to the petitioners' financial position and character, and considering, as he was bound to do, the possibility of the petitioners' flight as evidenced by the disappearance of other defendants in Smith Act cases, we do not know by what standard the petitioners can now claim that Judge Mathes fixed their bail in excessive amounts.

The foregoing discussion of the effect of the petitioners' refusal to answer questions relevant to the inquiry under Rule 46(c) has no application to the petitioner Kusnitz, who answered the questions addressed to her in the proceedings before Judge Mathes. However, in view of the purpose of bail to insure the appearance of defendants, and considering the likelihood of flight as established by the disappearance of defendants in other Smith

Act cases, we urge that the district court properly exercised its discretion in fixing her bail at $50,000.

Generally, we contend that on the record as a whole, and in the light of facts subject to judicial notice, the petitioners have made no showing that their bail was fixed in excessive amounts. Even if 11 of the petitioners had not blocked Judge Mathes' inquiry under Rule 46(c), they could not assert that bail must be tailored to their particular financial abilities. Bail is to be fixed in such amount "as in the judgment of the * * * court * * * will insure the presence of the defendant," and the financial ability of a particular defendant to give bail is only one of the factors to be considered in fixing bail. Equal weight is to be given to the nature and circumstances of the offense charged, while the dominant consideration is to "insure the presence of the defendant." In applying Rule 46(c), we believe that a court should not ignore, as petitioners contend it should, the fact that these petitioners are charged with active and leading roles in the same Communist conspiracy which was found to exist in *Dennis* v. *United States*, 341 U.S. 494, and the fact that other persons indicted or convicted on similar charges have disappeared or have jumped bail. Nor should the fact be ignored that when such persons have jumped bail, the courts have received not even minimum cooperation from those who became surety for their appearance. (See Mr. Justice Reed's Opinion of July 25, 1951, on the application of Field, et al. for

bail). The facts were such as to make the fixing of bail in the instant cases more than a perfunctory routine. That the district judge was precluded from making the inquiry required by Rule 46(c) is simply another reason why his action in fixing bail for the petitioners constituted a reasonable exercise of discretion.

## CONCLUSION

It is respectfully submitted that the bail fixed for the petitioners is not excessive.

PHILIP B. PERLMAN,
*Solicitor General.*

NOVEMBER, 1951

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